

**REGULAR STATE BANKING BOARD MEETING
HELD BY CONFERENCE CALL
OFFICE OF THE COMMISSIONER
DEPARTMENT OF FINANCIAL INSTITUTIONS
2000 SCHAFER STREET, SUITE G
BISMARCK, NORTH DAKOTA**

November 9, 2006

The regular meeting of the State Banking Board was held in the Office of the Commissioner, Department of Financial Institutions, 2000 Schafer Street, Suite G, Bismarck, North Dakota. Chairman Karsky called the meeting to order at 9:01 a.m., Thursday, November 9, 2006, by conference call.

MEMBERS PRESENT: Timothy J. Karsky, Chairman (*Office*)
Ron Braseth, Member (*Mayville*)
Loren Henke, Member (*Wishek*)
Roger Monson, Member (*Finley*)
Anita Quale, Member (*Watford City*)

MEMBERS ABSENT: Bill Daniel, Member
Launa Moldenhauer, Member

ALSO PRESENT: Robert J. Entringer, Secretary (*Office*)
Douglas D. Grenz, Chief Examiner – Banks (*Office*)

APPROVAL OF MINUTES

Chairman Karsky indicated the Board received copies of the minutes of the regular meeting held on September 7, 2006.

It was moved by Member Quale and seconded by Member Monson to approve the minutes as presented. The motion carried by a vote of 5 to 0, with Members Daniel and Moldenhauer absent.

REQUEST BY SCANDIA AMERICAN BANK & TRUST, STANLEY, TO TRANSFER \$998,529.77 FROM SURPLUS TO UNDIVIDED PROFITS AND TO PAY A \$462,000 DIVIDEND

Chief Examiner Grenz explained the reason for the request to transfer the funds from surplus to undivided profits is due to the acquisition of Scandia American Bank & Trust, Stanley, by American Bancor, Ltd., and the required pushdown accounting. As a result of the pushdown accounting, the bank's undivided profits account is zeroed out because the assets which can be valued at fair market value and any balance remaining in undivided profits which cannot be allocated to a fair market valuation for assets or liabilities is then transferred to surplus. Previously the State Banking Board approved a transfer from surplus to undivided profits to accommodate the bank's dividend need; however, that transfer was not sufficient and the bank is requesting this additional transfer. In addition, the bank is requesting a \$462,000 dividend to be paid to the holding company and the equity capital remaining after the dividend is projected to be at 8%.

It was moved by Member Monson and seconded by Member Braseth to approve the request by Scandia American Bank & Trust, Stanley, to transfer \$998,529.77 from surplus to undivided profits and to approve the dividend of \$462,000. The motion was carried by a vote of 5 to 0, with Members Daniel and Moldenhauer absent.

ITEMS TO BE NOTED

Comptroller of the Currency

Effective 6-15-06, Alerus Financial, NA, Grand Forks, opened Osgood branch at 4201 45th St S, Fargo.

Effective 6-15-06, Alerus Financial, NA, Grand Forks, opened Eagle Run branch at 3342 Sheyenne St, Fargo.

On 10-11-06, received notice that First Security Bank, Underwood, will merge with The First National Bank of McClusky, with name change to North Country Bank, National Association, McClusky.

AUTHORIZATION FOR STATE-CHARTERED BANKS TO OFFER HEALTH SAVINGS ACCOUNTS AND ACT AS CUSTODIAN FOR THOSE ACCOUNTS

Assistant Commissioner Entringer explained the reason for the request for the Board to consider an Order Authorizing State-Chartered Banks to Offer Health Savings Account and Act as Custodian is because currently the Department has an application for limited trust powers from Choice Financial Group which would authorize the bank to act as custodian for health savings accounts. Assistant Commissioner Entringer explained that under the North Dakota Century Code Section 6-03-02, Powers, it specifically authorizes North Dakota state-chartered banks to act as custodian for retirement accounts which are deposited in savings or certificates of deposit. Since retirement accounts were specifically identified in the Powers section as well as the authorization to act as custodian, it was felt that a state-chartered bank would need specific authority to act as custodian for a health savings account. However, in researching the matter it was determined that the corporate powers under Section 6-05-08 of the North Dakota Century Code, which is where a bank would obtain trust powers, nowhere does it include acting as custodian. Also, in reviewing the Federal Deposit Insurance Corporation Trust Examination Manual it refers to a custodianship which means the trust department only has the duties of safekeeping property and performing ministerial acts as directed by the principal. Additionally, in reviewing the Code of Federal Regulations which governs nation banks, the definition of fiduciary capacity means a trustee, executor, administrator; registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under uniform gifts to minors act; investment advisor, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 USC 92a. As you can see, the national banking law only refers to custodianships with respect to uniform gifts to minors act and as a result Assistant Commissioner Entringer indicated he requested Assistant Attorney General Webb to review the question and determine if a national bank needs authorization from the OCC for trust powers to act as custodian for HSA accounts. Assistant Attorney General Webb indicated in his research it appears if the national banking law does not specifically direct that they have the power to act in a certain capacity then they can look to state law and use state law to act in a capacity; however, in our situation we have the wild card law that allows a state bank to do anything a national bank can do, so we have a somewhat circular reference. It did appear to Assistant Attorney

General Webb that national banks do not need authority to offer health savings accounts nor to act as custodian.

Assistant Commissioner Entringer indicated as a result of the research conducted it would appear that the State Banking Board could issue an Order under Section 6-03-02(7) making the offering of health savings accounts an incidental power necessary to carry on the business of banking and to act as custodian for those health savings accounts. Ultimately this issue will be resolved because the North Dakota Bankers Association will introduce a bill amending Section 6-03-02 specifically identifying and authorizing state-chartered banks to offer health savings accounts and act as custodian for those accounts.

Assistant Commissioner Entringer stated he emailed the proposed Order to the Board members prior to this morning's meeting and asked that they consider adopting such Order.

It was moved by Member Braseth and seconded by Member Quale to adopt the Order Authorizing State-Chartered Banks to Offer Health Savings Accounts and Act as Custodian. The motion carried by a vote of 5 to 0, with Members Daniel and Moldenhauer absent.

Assistant Commissioner Entringer indicated the Order would be circulated via round robin for the Board's signature.

PROPOSED MEETING DATES FOR 2007

After discussion, the Board approved the following meeting dates for 2007: January 11, March 1, May 10, July 12, September 13, and November 8.

The Board went into closed session at 9:20 a.m.

Timothy J. Karsky, Chairman

Robert J. Entringer, Secretary